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The Enemy-Property Doctrine: A Double Whammy?

Ilana Tabacinic

NOTES

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INTRODUCTION

On August 20, 1998, Salah Idris, described by the *Wall Street Journal* as "a fortune-charmed millionaire of the kind the Middle East often produces," encountered a few problems: His factory was destroyed, his account with a U.S. bank was frozen, and he was "fingered by U.S. intelligence authorities as a presumed front man for Islamic fundamentalist terrorist Osama bin Laden."[1] Idris had paid $12 million and assumed $18 million of debt to become the essential owner of El-Shifa Pharmaceuticals Industries Company in Khartoum, Sudan.[2] El-Shifa was the largest producer of malaria tablets in Africa[3] and had received approval by U.S. officials for a United Nations contract to ship veterinary medicine to Iraq as part of the Oil-for-Food Program.[4]

On August 7, 1998, in near simultaneous attacks, U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania were attacked by truck bombs.[5] In an effort to retaliate, President Clinton personally targeted El-Shifa and a terrorist base in Afghanistan as enemy property.[6] Tomahawk cruise missiles subsequently bombed and destroyed the facilities.[7] In addressing the nation after the attack, President Clinton explained that intelligence reports indicated the plant was manufacturing a component of nerve gas for terrorists, and that the destruction was a necessary act of

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* J.D. Candidate 2008, University of Miami School of Law. I dedicate this note to Manuel Tabacinic, an extraordinary man who inspires me to achieve my potential. I also thank the Tabacinic-Gorenstein family, who have been a constant source of support, as well as Stephen Vladeck for his invaluable assistance with this piece.

1. Daniel Pearl, *In Sudanese Bombing, 'Evidence' Depends on Who Is Viewing It*, WALL ST. J., Oct. 28, 1998, at A1.

2. *Id.*

3. James Bovard, *Déjà Vu Five Years Before Iraq*, WASH. TIMES, Aug. 31, 2003, at B4.

4. Doug Bandow, Op-Ed., *Making It Right in Sudan; U.S. Owes Damages for Pharmaceutical Bombing*, WASH. TIMES, Aug. 10, 2001, at A21.

5. Ken Fireman, *U.S. Strikes Back*, NEWSDAY (New York), Aug. 21, 1998, at A3; *see also* El-Shifa Pharm. Indus. Co. v. United States (*El-Shifa I*), 55 Fed. Cl. 751, 753 (2003).

6. *El-Shifa I*, 55 Fed. Cl. at 753.

7. *Id.*

national defense.[8] Four days later, the United States froze $24 million of Idris's assets, which he had deposited in Bank of America.[9]

Naturally, El-Shifa filed a complaint in the Court of Federal Claims seeking $50 million in damages as compensation for the destruction of the plant by the United States.[10] Congressman Dana Rohrabacher (R-Cal.) introduced legislation to reimburse Idris, but other legislators were hesitant to take on the controversy.[11] Alternatively, Representative Rohrabacher proposed a resolution asking the Court of Federal Claims to investigate Idris's claim.[12] In the Court of Federal Claims, El-Shifa argued that it was the largest pharmaceutical-manufacturing company in Sudan; that the plant supplied drugs to the impoverished people living in that country; and "that it had no connection whatsoever to chemical weapons, Osama bin Laden or international terrorism."[13] The Court of Federal Claims found in favor of the government on the ground that the Takings Clause did not "extend to claims arising out of military operations against enemy war-making instrumentalities."[14] El-Shifa appealed, claiming that the designation of its property as an enemy war-making facility was made on the basis of "erroneous intelligence."[15] On appeal,

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8. The facilities were linked to Osama bin Laden's al Qaeda terrorist network and the strikes were ordered, according to President Clinton, for four reasons: First, because the President had convincing evidence that these groups played a key role in the Embassy bombings; second, because these groups had executed terrorist attacks against Americans in the past; third, because there was compelling information that the groups were planning additional terrorist attacks; fourth, because the groups were seeking to acquire chemical and other dangerous weapons. Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 20, 1998); *see also* President's Radio Address, 2 PUB. PAPERS 1464 (Aug. 22, 1998) (noting that the purpose of the strike was to "destroy, in Sudan [a] factory with which bin Ladin's network is associated, which was producing an ingredient essential for nerve gas"); Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464 (Aug. 21, 1998) (stating that the strikes were ordered "pursuant to [his] constitutional authority [as President] to conduct U.S. Foreign relations and as Commander in Chief and Chief Executive"); Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460, 1461 (Aug. 20, 1998) (describing the target as an enemy-related facility that posed an "immediate threat" to the United States).

9. Bandow, *supra* note 4; *see also* Marc Lacey, *Khartoum Journal; Look at the Place! Sudan Says, 'Say Sorry,' But U.S. Won't*, N.Y. TIMES, Oct. 20, 2005, at A4.

10. *El-Shifa I*, 55 Fed. Cl. at 754.

11. H.R. 5290, 106th Cong. (2000); Bandow, *supra* note 4.

12. H.R.J. Res. 593, 106th Cong. (2000); Bandow, *supra* note 4.

13. *El Shifa I*, 55 Fed. Cl. at 754; *Sudanese Pharmaceutical Plant Owner Sues U.S. for Bombing*, TEHRAN TIMES, July 29, 2000, *available at* 2000 WLNR 7947971.

14. *El-Shifa I*, 55 Fed. Cl. at 755–56, 774 (concluding that a court could not "look behind the President's discharge of his Constitutional duties as Commander in Chief, including his declaration of what constitutes an enemy target and his determination to use military force to destroy that target").

15. Brief of Plaintiffs-Appellants at 1, El-Shifa Pharm. Indus. Co. v. United States (*El-Shifa II*), 378 F.3d 1346 (Fed. Cir. 2004) (No. 03-5098) (arguing that "[i]n the face of widespread criticism of the attack on the El-Shifa plant, the Government publicly abandoned its initial

the Federal Circuit affirmed, noting that enemy property can be destroyed without just compensation.[16] In addition, the Federal Circuit held that the political-question doctrine barred review of the President's designation of El-Shifa as enemy property.[17] According to the opinion, the President's power to designate the private property of an alien situated on foreign soil as enemy property is textually committed to the executive branch.[18]

In deciding whether the destruction of property targeted as enemy, owned by nonresidents and located abroad, constitutes a compensable taking, the Federal Circuit created a new doctrine. The opinion is the first time a court refers to the existence of an enemy-property doctrine.[19] In fact, the line of cases cited by the Federal Circuit as part of the enemy-property doctrine corresponds primarily to two separate military-takings principles: the military-necessity doctrine and the alien-enemy disability rule.[20]

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justifications for the attack, and in this suit it has carefully avoided stating whether the plant was in fact involved in the production of chemical weapons or connected to international terrorism"). The smoking gun leading to the initial justifications for the attack was a soil sample taken by a foreign agent from an area near the plant more than seven months before the attacks. *Id.* at 8. El-Shifa argued that EMPTA, the nerve gas allegedly found in the facility, has innocent commercial uses and is chemically similar to pesticides commonly used in both Africa and the United States. *Id.* at 8–10.

16. *El-Shifa II*, 378 F.3d at 1348, 1360–61.

17. *Id.* at 1365. The political-question doctrine directs a court to abstain from addressing the merits of the dispute on the basis that the Constitution has committed final interpretive authority to one of the political branches of the government. *Id.*; *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (setting forth six tests for determining the presence of a nonjusticiable political question including "a textually demonstrable constitutional commitment of the issue to a coordinate political department").

18. The Federal Circuit found the President's power to make extraterritorial enemy-property designations as a necessary part of the President's power to wage war. *El-Shifa II*, 378 F.3d at 1363–64. In the words of the *El-Shifa II* court: "We cannot envision how a military commander, much less the Commander-in-Chief, could wage war successfully if he did not have the inherent power to decide what targets, *i.e.*, property, belonged to the enemy and could therefore be destroyed free form takings liability." *Id.* at 1364.

19. *Id.* at 1356–57, 1359.

20. The Federal Circuit cited *Perrin v. United States*, 4 Ct. Cl. 543, 543 (1868) at length—*Perrin* discusses the principles of military necessity and the alien-enemy doctrine. *El-Shifa II*, 378 F.3d at 1356 ("*Perrin* was the first case in which the outlines of an enemy property doctrine applicable to takings jurisprudence can be recognized.") (citations omitted); *id.* at 1357 ("The Supreme Court applied enemy property doctrine to a number of military takings cases that followed *Perrin*.") (citation omitted). In addition, the Federal Circuit discussed *United States v. Pacific Railroad*, 120 U.S. 227, 228–31 (1887), which addressed the military-necessity doctrine. *El-Shifa II*, 378 F.3d at 1359 (citing United States v. Caltex (Phil.), Inc., 344 U.S. 149, 154 (1952)) (noting that "nearly seventy years later, the Court confirmed that the *Pacific Railroad* Court's discussion of the enemy property doctrine was in fact the law of the land"). With respect to the alien-enemy disability rule, the Federal Circuit relied on *Juragua Iron Co. v. United States*, 212 U.S. 297, 297 (1909) and *Seery v. United States*, 127 F. Supp. 601, 605–06 (Ct. Cl. 1955) among other cases. *El-Shifa II*, 378 F.3d at 1357.

This note attempts to ascertain the meaning of the enemy-property doctrine by examining and surveying the history of its components. Part II of this note provides a contextual background, including a brief overview of the Takings Clause. Part III surveys the military-necessity doctrine and its relationship to the Federal Circuit's assemblage of the enemy-property doctrine. Part IV discusses the alien-enemy disability rule and its effect on the opinion in *El-Shifa*. Part V explores the applicability of the Takings Clause to nonresident aliens whose property is located abroad. Finally, Part VI scrutinizes the treatment of the enemy-property doctrine as a novel principle and analyzes its potential application to future cases.

II. CONTEXTUAL BACKGROUND

"Every civilized State recognizes its obligation to make compensation for private property taken under pressure of State necessity, and for the public good."[21] In the United States, this compensation is provided pursuant to the Takings Clause of the Fifth Amendment of the U.S. Constitution.[22] "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[23] The Takings Clause does not qualify what is meant by "private property," indicate that it must be located in a certain country, or say that it is only available to U.S. citizens.[24] Hence, whether a Fifth Amendment takings claim is colorable depends on the particular circumstances of each case.[25]

A taking can occur simply when the government deprives property owners of all or most of their interest.[26] It is not necessary for the government to take actual possession of the property. For instance, a Fifth Amendment taking can occur if the government deprives a property owner of property use,[27] or if the government allows someone else to benefit from or use the property of another.[28] However, "the constitu-

21. Grant v. United States, 1 Ct. Cl. 41, 43 (1863).

22. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

23. Armstrong v. United States, 364 U.S. 40, 49 (1960).

24. *El-Shifa II*, 378 F.3d at 1351.

25. United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958).

26. *See* United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

27. United States v. Causby, 328 U.S. 256, 266–67 (1946) (finding that frequent flights immediately above a landowner's property constituted a taking).

28. *See, e.g.*, Eyherabide v. United States, 345 F.2d 565, 570 (Ct. Cl. 1965) ("If the Government's encroachments on private property make it possible for another to get the benefits

tional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; . . . some play must be allowed to the joints if the machine is to work."[29] For instance, courts have found that regulations that merely deprive owners of the most profitable use of their property are insufficient to establish a right to compensation.[30]

In the military context, foreign-owned property located within the United States[31] and foreign property owned by U.S. citizens,[32] both fall within the ambit of the Takings Clause. However, in terms of compensation, property located outside the United States or property that is not owned by a U.S. citizen is limited by alien-enemy principles and the military-necessity doctrine.[33] "It is axiomatic that the fifth amendment is not suspended in wartime, but it is equally well recognized that a destruction of private property in battle or by enemy forces is not compensable."[34] Therefore, to decide whether a military-takings case presents a claim under the Takings Clause, courts look to decisional-law principles to distinguish the losses that are necessary incidents of war from those situations where property is taken for public use.[35] In *El-Shifa*, this decisional law was collectively considered as the "enemy property doctrine."[36]

III. THE MILITARY-NECESSITY DOCTRINE

Although the doctrine of military necessity is more than 200 years old,[37] the Federal Circuit in *El-Shifa* refers to military-necessity case law

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of that property, the United States is liable just as if it used the property for itself.") (citation omitted).

29. Tyson & Brother-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 445–46 (1927) (Holmes, J., dissenting).

30. *Cent. Eureka Mining Co.*, 357 U.S. at 168 (citations omitted) (noting that courts have been reluctant to require compensation to be paid for regulations that result in losses of income because temporary wartime economic restrictions are insignificant when compared to the widespread uncompensated loss of life and freedom of action, which war traditionally demands).

31. In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489–92 (1931), the U.S. Supreme Court found that a Russian corporation that assigned contracts for the construction of two vessels was owed just compensation under the Fifth Amendment when the United States requisitioned the contracts and the vessels for its use. The property was located in the United States at the time of the taking. *Id.* at 487.

32. *See, e.g.*, Seery v. United States, 127 F. Supp. 601, 603–04 (Ct. Cl. 1955) (rejecting argument that takings claim by naturalized U.S. citizen should be dismissed because the property was located in Austria).

33. *See, e.g.*, Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 396 F.2d 467, 470 (Ct. Cl. 1968).

34. *El-Shifa II*, 378 F.3d 1346, 1356 (Fed. Cir. 2004) (quoting *Nat'l Bd. of Young Men's Christian Ass'ns*, 396 F.2d at 470) (emphasis omitted).

35. *Id.* (quoting *Nat'l Bd. of Young Men's Christian Ass'ns*, 396 F.2d at 470).

36. *Id.* at 1358, 1361.

37. *See* Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 214–15 (1998) (explaining how the

as outlining the "enemy property doctrine applicable to takings jurisprudence."[38] To discern whether the Federal Circuit's interpretation of military necessity as part of the enemy-property doctrine is a logical extension, an examination of the precedent forming the military-necessity doctrine is essential.

Military necessity is a limited emergency power that exculpates the government from having to pay just compensation for the taking of property.[39] The doctrine allows property to be lawfully taken or destroyed to prevent it from falling into enemy hands, or as is necessary to protect the state or its citizens.[40]

Military necessity has also been interpreted as involving the necessity of those measures that are indispensable for securing the ends of war, "which are lawful according to modern usage and usages of war."[41] Military necessity is different from force majeure; the former always involves a deliberate choice to disregard a rule, while the latter includes only extraneous events that make performance impossible.[42] Although the doctrine has been criticized as providing a pretext for a "barbarous system of warfare,"[43] military necessity has been applied to rules of self-defense,[44] treatment of the wounded,[45] military commissions,[46] and pri-

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concept of military necessity was outlined in the Lieber Code in the eighteenth century and applied as early as 1868 to ban the use of small-caliber explosive bullets).

38. *Id.* at 1356 (citing Perrin v. United States, 4 Ct. Cl. 543, 543 (1868)).

39. *Perrin*, 4 Ct. Cl. at 547–48.

40. United States v. Pac. R.R., 120 U.S. 227, 239 (1887) (finding the government not responsible "for injuries to or destruction of private property in necessary military operations during the civil war").

41. Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Petitioner/Appellee Urging Affirmance at 5–6, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393) (citation omitted) [hereinafter Brief of National Ass'n of Criminal Defense Lawyers]. The Petitioner further argued that "military necessity is limited by the law of war and is not a blank check for unfettered Executive action." *Id.* at 6; *see also* U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL No. 27-10 (1956) (defining military necessity as a "principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible").

42. Carnahan, *supra* note 37, at 218 n.32.

43. RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 123 (1983) (quoting Confederate Secretary of War, James A. Seddon).

44. Major David L. Willson, *An Army View of Neutrality in Space: Legal Options for Space Negation*, 50 A.F. L. REV. 175, 210 (2001) (noting that "if all other methods have failed or are futile, the requirement of necessity in self-defense will be automatically satisfied").

45. Stephen W. Simpson, *Shoot First, Ask Questions Later: Double-Tapping Under the Laws of War*, 108 W. VA. L. REV. 751, 760 (2006) (recognizing that the obligation to take in the wounded in the Lieber Code contained a caveat for military necessity).

46. Brief of National Ass'n of Criminal Defense Lawyers, *supra* note 41, at 8 n.33 ("'Military Commissions, for the trial of offenders against the laws of war . . . [are] founded in necessity'" (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES 6 (1908 ed.)).

vate property.[47]

The military-necessity doctrine had rough beginnings. In the early 1800s the U.S. Supreme Court did not recognize military necessity as a military power. In *Brown v. United States*,[48] a case that has not been overruled since it was decided in 1812, Chief Justice Marshall found that the laws of war gave "to the sovereign full right to take the persons and confiscate the property of the enemy wherever found."[49] In fact, the opinion specified that "[t]he mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself."[50] A showing of necessity was not a requirement to justifying a taking without compensation. Instead, the authority to confer the power of confiscation of enemy property rested in the legislature.[51] "The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. . . . [Thus,] [i]t is proper for the consideration of the legislature, not of the executive or judiciary."[52]

Hence, the procedure outlined by Chief Justice Marshall for the confiscation of property included a declaration of war and a legislative act showing congressional intent to confiscate the property of enemies found within the United States.[53] This procedure was fashioned using principles of international law, which Marshall saw as premised on concerns of international comity.[54] According to Marshall,

> a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country that it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that applies to us.[55]

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47. United States v. Russell, 80 U.S. (13 Wall.) 623, 628 (1871) (finding that an emergency must be shown to exist before the taking of property can be justified).

48. 12 U.S. (8 Cranch) 110 (1814).

49. *Id.* at 122; *see also* Charles A. Flint, *Challenging the Legality of Section 106 of the USA PATRIOT Act*, 67 ALB. L. REV. 1183, 1184–85 (2004) (discussing the same powers under *Brown* as well as under the PATRIOT Act).

50. *Brown*, 12 U.S. (8 Cranch) at 122–23.

51. *Id.* at 129 (finding that the lack of a legislative act showing congressional will to confiscate British property found on U.S. land precluded condemnation as enemy's property).

52. *Id.* at 128–29. The Court also stated that "when the sovereign authority shall chuse [sic] to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." *Id.* at 123.

53. *Id.* at 125–29.

54. Marshall relied on theories contained in EMMERICH DE VATTEL, THE LAW OF NATIONS (Joseph Chitty, ed., T. & J.W. Johnson 1852) (1758) to explain that the Constitution was framed at a time when principles of international law had been "received throughout the civilized world." *Id.* at 125; *see also* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 20 (2006) (citing *Brown*, 12 U.S. (8 Cranch) at 125).

55. *Brown*, 12 U.S. (8 Cranch) at 125.

Looking at the Constitution itself, he added, this general reasoning is much strengthened by the words of the instrument.[56]

The unfettered discretion to enjoy enemy property was put to rest in 1863 when President Lincoln commissioned the earliest official codification of the laws of war, which included the military-necessity doctrine.[57] The Lieber Code, named after a professor of law at Columbia College (now Columbia University), was a response to the expansion of the U.S. Army during the Civil War and provided a standard for inexperienced officers to follow.[58] The Code, "a comprehensive body of principles governing the conduct of belligerents in enemy territory,"[59] contained an "open-ended definition of military necessity."[60] The recognition of military necessity as a prerequisite for destruction represented an "enlightened advance in the laws of war."[61]

According to the Code, "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[62] Article 15 limited the concept, noting that " it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army."[63] Lieber's Code broadly construed the concept of military necessity, but at the same time limited its reach, requiring that military necessity be lawful according to the evolving modern laws of war.

In addition to the Lieber Code, *The Prize Cases* substantially contributed to the formation of the military-necessity doctrine.[64] *The Prize Cases*, which were the first to coin "[e]nemies' property" as a technical phrase,[65] considered the enemy status of property that was apparently owned by neutrals, not actual enemies.[66] One of the cases involved a

56. *Id.*

57. Carnahan, *supra* note 37, at 213.

58. Flint, *supra* note 49, at 1190.

59. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 834 (1986).

60. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 65–66 (1994).

61. Carnahan, *supra* note 37, at 217.

62. *Id.* at 215.

63. *Id.* at 216.

64. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 635 (1862).

65. *See El-Shifa II*, 378 F.3d 1346, 1356 n.4 (Fed. Cir. 2004) (quoting *The Prize Cases*, 67 U.S. (2 Black) at 674).

66. 67 U.S. (2 Black) at 666, 680.

merchant vessel from Richmond, Virginia.[67] The Quaker city captured the vessel, and the President treated it as a prize of war.[68] The vessel's registered owners, who were Virginia residents, denied involvement with the Civil War or hostility to the government.[69] Nevertheless, the U.S. Supreme Court upheld President Lincoln's Civil War blockade and denied just compensation.[70] The Court noted that "[t]he right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war."[71] It is of no consequence whether the property belongs to an ally or a citizen;[72] whether the property owner was a naturalized citizen of the enemy; whether he was loyal to the enemy; or whether the property would have benefited the enemy or, if captured, injured the enemy.[73] Instead, "[t]he test is whether *the residence of the owner is under the established de facto jurisdiction and control of the enemy*. . . . It is the illegal traffic that stamps it as enemies' property,"[74] and it is the laws of war that recognize the right to reduce the power of the enemy, including money, wealth, and products of agriculture and commerce as necessary.[75]

By 1863 Lincoln had ordered federal commanders to "seize and use any property, real or personal, which may be necessary or convenient for their several commands, as supplies, or for other military purposes."[76] Then, in his defense of the Emancipation Proclamation as a proper war measure, Lincoln argued that depriving the enemy of usable resources, including slaves, was justified by the military-necessity doctrine:

> The most that can be said, if so much, is, that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy? Armies, the world over, destroy enemies' property when they can not use it; and even destroy their own *to keep it from the enemy*.[77]

The continually expanding reach of the concept of military necessity may support the assertion that the doctrine was used as a pretext for

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67. *Id.* at 637.
68. *Id.*
69. *Id.*
70. *Id.* at 671–72.
71. *Id.* at 671.
72. *Id.* at 674.
73. *Id.* at 651.
74. *Id.* at 658, 674.
75. *Id.* at 671–72.
76. ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, at 342–43 (Library of Am. ed., 1989).
77. *Id.* at 497 (emphasis added).

mischief.[78] In addition, as evidenced by later cases, Lincoln's strategy during the Civil War helped create and shape the doctrine of military necessity.

Courts began to award compensation and to consider the property of friendly or loyal individuals as included within the military-necessity doctrine by the mid-1800s. In *Wiggins v. United States*, the Court of Claims awarded compensation to an individual, not associated with enemy forces, whose gunpowder was ordered destroyed by a commander of the U.S. Army.[79] The destruction occurred as 21,000 pounds of gunpowder, stored in Punta Arena, Costa Rica, were awaiting sale to the Nicaraguan government.[80] The storage facility was near a company where U.S. citizens worked on transporting passengers and freight.[81] The army justified destroying the property as a means of preventing an invasion by Nicaraguan inhabitants, as revenge for earlier conflicts with the United States, and for injuries to U.S. citizens who worked in the company.[82]

Later case law continued to characterize the military-necessity doctrine as allowing for "full compensation to the owner," especially if the danger was "immediate and impending" or if "the necessity [was] urgent for public service."[83] The military-necessity doctrine was premised on the emergency: "It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."[84] Property that was not seized in light of danger, to defend, to place troops in a safer place, or to anticipate the attack of an approaching enemy, was held not to involve military necessity.[85]

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78. Carnahan, *supra* note 37, at 227.

79. Wiggins v. United States (The Wiggin's Case), 3 Ct. Cl. 412, 421–23 (1867).

80. *Id.* at 420–21.

81. *Id.* at 421.

82. *Id.* The Court of Claims also granted compensation in *Grant v. United States*, 1 Ct. Cl. 41 (1863), which involved buildings and supplies located in Arizona and destroyed by U.S. troops to prevent capture by the enemy, the Confederate forces. *Id.* at 40–50. The property was owned by a government contractor who furnished commissary and supplies for the forts and military posts in Arizona. *Id.* at 41. The taking was, according to the decision, one of public exigency by a military officer governed by the law of eminent domain. *Id.* at 44–47. The Court of Claims distinguished military necessity by noting that eminent domain rights are different from cases involving an "overruling necessity." *Id.* at 45. The latter was defined by the Court as a "*natural right*, older than States . . . . The one may be fettered by constitutional limitations—the other is beyond the reach of constitutions." *Id.*

83. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1851) ("[W]here the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.").

84. *Id.*

85. *Id.* at 135 (finding that the seizure of horses, mules, wagons, goods, chattels, and merchandise of a U.S. trader seized in 1847 during the Mexican American War did not involve a necessity because its purpose was to "insure the success of a distant and hazardous expedition").

The doctrine of military necessity was specifically limited as one excluding compensation beginning with *Perrin v. United States*.[86] *Perrin*, termed by the Federal Circuit in *El-Shifa* as "a seminal case in th[is] decisional law,"[87] began a series of cases where courts indicated that the safety of the state outweighed all considerations of private loss.[88] Specifically, according to the *El-Shifa* court, the *Perrin* court distinguished "between the civil power of eminent domain comprehended by the Fifth Amendment, and the exercise of military power which falls outside it."[89]

Perrin involved merchandise owned by a naturalized U.S. citizen and her husband.[90] The merchandise was shipped to San Juan, Nicaragua for storage.[91] On July 13, 1854, by order of the President, U.S. Navy forces attacked the town, and the "town was totally destroyed," including Mrs. Perrin's goods.[92] The Court of Claims denied Mrs. Perrin's claim for just compensation and dismissed the suit, noting that

> [n]o government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy; much less is any government bound to pay for the property of neutrals domiciled in the country of its enemy, which its forces may chance to destroy in its operations against such enemy.[93]

In making this determination, the *Perrin* court distinguished between prior cases where compensation had been awarded for property destroyed to prevent it from falling into the hands of the public enemy, vis-à-vis property destroyed in hostile operations against the public enemy.[94] Specifically, in cases involving damage or destruction of property caused by necessary military operations of the army during war, or measures taken for the troops' safety and efficiency, no compensation is owed.[95]

Following *Perrin*, the principle that the government is not responsible "for injuries to or destruction of private property in necessary mili-

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86. 4 Ct. Cl. 543, 547–48 (1868).

87. *El-Shifa II*, 378 F.3d 1346, 1356 (Fed. Cir. 2004).

88. *E.g.*, United States v. Caltex (Phil.), Inc., 344 U.S. 149, 154 (1952).

89. *El Shifa I*, 55 Fed. Cl. 751, 768 (2003).

90. 4 Ct. Cl. at 546 ("The claimant and her husband, Mr. Trautman Perrin, were French subjects, temporarily domiciled at Greytown [but Mrs. Perrin had become a naturalized American citizen].").

91. *Id.*

92. *Id.* at 547 ("A large portion of the place was battered down by the guns of the ship, and then a party was sent on shore to apply the torch, and complete by burning what had escaped the bombardment.").

93. *Id.* at 547–48.

94. *Id.* at 547 (citing Wiggins v. United States (The Wiggins's Case), 3 Ct. Cl. 412, 421 (1867); Grant v. United States, 1 Ct. Cl. 41, 49–50 (1863)).

95. *Perrin*, 4 Ct. Cl. at 547–48.

tary operations during the civil war, . . . [was] thus considered established."[96] Later cases merely polished the contours of the doctrine. In *United States v. Pacific Railroad*, a case considered by the Federal Circuit as one discussing the enemy-property doctrine, the U.S. Supreme Court examined the destruction of some bridges by Union Forces during the Civil War.[97] The military had destroyed certain bridges to impede the advance of the Confederate Army and then repaired some but not all of the bridges.[98] The Court found that the government could not be held liable under the Fifth Amendment for the destruction of the bridges:[99]

> The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this.[100]

The U.S. Supreme Court expressly identified this rule enunciated in *Pacific Railroad* as binding law nearly seventy years later.[101] In *United States v. Caltex (Phil.), Inc.*, a case relied upon by the Federal Circuit, the U.S. Supreme Court declined to award compensation to an oil company in the Philippines that had a facility that was requisitioned by the U.S. Army after Pearl Harbor.[102] The destruction was justified as a military necessity in light of the enemy's approach to the city.[103] The facility was "rendered useless to the enemy" and the "enemy was deprived of a valuable logistic weapon."[104] Moreover, because the property was destroyed and "not appropriated for subsequent use," the case thus fell within the rule "that in wartime many losses must be attributed solely to

96. United States v. Pac. R.R., 120 U.S. 227, 239 (1887) (noting that compensation provided in prior cases was generally stated by the President to be "a matter of bounty rather than of strict legal right").

97. *Id.* at 229–32.

98. *Id.* at 229.

99. *Id.* at 233–40. The U.S. Supreme Court further noted that in cases where the government could not be charged for injuries or destruction of property, the reverse was also true: "[P]rivate parties cannot be charged for works constructed on their lands by the government to further the operations of its armies." *Id.* at 239. Thus, the railroad company need not reimburse the government for expenses incurred in repairing some of the bridges. *Id.*

100. *Id.* at 234.

101. United States v. Caltex (Phil.), Inc., 344 U.S. 149, 154 (1952) ("Whether or not the principle laid down by Mr. Justice Field [in *Pacific Railroad*] was dictum when he enunciated it, we hold that it is law today.").

102. *Id.* at 150–56.

103. *Id.* at 153–54.

104. *Id.* at 151.

the fortunes of war, and not to the sovereign."[105] The reluctance of courts to award compensation in cases following *Perrin* demonstrates that the earlier understanding of the doctrine as one providing for compensation became the exception rather than the default.

Military necessity, however, is a narrow principle. Courts have found military necessity inapplicable in cases where property of loyal citizens is taken for the service and subsequent use of the army.[106] Examples include vessels or steamboats used for transport of troops and munitions, or buildings used for warehousing and storage.[107] For example, the U.S. Supreme Court found that an urgent necessity did not exist in *Mitchell v. Harmony*, a case where property was seized to ensure the success of a military expedition.[108] Although the Court acknowledged that it is impossible to define the particular circumstances of danger or necessity in which the power of military necessity may be lawfully exercised, the property in this case was not seized to defend, to place troops in a safer place, or to anticipate an attack.[109] The Court later distinguished *Mitchell* and a similar case noting that "[i]n neither was the Army's purpose limited . . . to the sole objective of destroying property of strategic value to prevent the enemy from using it to wage war the more successfully."[110]

Nevertheless, military necessity does include cases where an individual suffers property loss from governmental conduct dictated by a military objective—so long as the purposes are proper objectives.[111] As stated by the U.S. Supreme Court in *United States v. Central Eureka Mining Co.*, so long as damages are incidental to the government's lawful regulation of matters reasonably deemed essential to the war effort, no compensation is owed.[112] The military objective in *Central Eureka*, supporting the government's requirement that nonessential gold mines be closed down, was to conserve equipment and labor during war.[113]

In addition, a formal declaration of war is not necessary to deny compensation under the military-necessity doctrine. In *National Board of Young Men's Christian Associations v. United States*, the Court of Claims considered destruction of and damage to properties in the Panama Canal Zone after a riot in 1964 as falling outside the confines of the

105. *Id.* at 155–56 (citations omitted).
106. *See id.* at 153.
107. *See* United States v. Russell, 80 U.S. (13 Wall.) 623, 627–28 (1871).
108. 54 U.S. (13 How.) 115, 134–35 (1851).
109. *Id.* at 135.
110. *Caltex*, 344 U.S. at 153 (citing *Russell*, 80 U.S. (13 Wall.) at 627–28; *Mitchell*, 54 U.S. (13 How.) at 129–30, 134–35).
111. United States v. Cent. Eureka Mining Co., 357 U.S. 155, 169 (1958).
112. *Id.*
113. *Id.*

Fifth Amendment.[114] Although the United States was not at war with the Republic of Panama at the time, U.S. Army troops were using the private property as refuge during a sustained attack by a mob under conditions presenting immediate danger to the lives of U.S. citizens.[115]

Cases discussing the military-necessity doctrine provide certain parameters; nevertheless, whether a constitutional taking is not compensable is a question ultimately turning upon the particular circumstances of each case.[116] There are no certain guidelines defining military necessity.[117] However, prime situations supporting a taking under the military-necessity doctrine include the purposeful and necessary destruction of property for the safety of troops or to meet an emergency threatening great public danger.[118] In these cases, courts have consistently found that cases where civilian property has been destroyed or expropriated fall outside the Fifth Amendment.[119]

The Federal Circuit's application of military-necessity principles to the enemy-property doctrine in *El-Shifa* may be justified primarily because President Clinton alleged the destruction was necessary to secure national self-defense.[120] However, the analysis of *El-Shifa* and any other necessity case under the label of the enemy-property doctrine must meet the narrower parameters established by military-necessity precedent.

First, military necessity is limited to those military destructions or appropriations where "the public danger must be immediate, imminent, and impending."[121] Whether *El-Shifa* satisfies the requirements of the military-necessity doctrine is thus a question that must be based on the nature of the problem faced, not on the conduct undertaken. Second, military necessity condones purposeful interference with the property of another, not circumstances where the property is destroyed erroneously.[122] The application of the military-necessity doctrine to the enemy-property doctrine will be unjustified if used to support accidental, erroneous, or unintentional destruction of property. Third, military-necessity principles do not support the destruction of property on the

114. 396 F.2d 467, 468, 470–71, 475 (Ct. Cl. 1968).

115. *Id.* at 470–71.

116. *See Cent. Eureka Mining Co.*, 357 U.S. at 168; United States v. Caltex (Phil.), Inc., 344 U.S. 149, 156 (1952).

117. *See Cent. Eureka Mining Co.*, 357 U.S. at 168; *Caltex*, 344 U.S. at 156.

118. *See, e.g.*, United States v. Pac. R.R., 120 U.S. 227, 234 (1887); *Nat'l Bd. of Young Men's Christian Ass'ns*, 396 F.2d at 472; Perrin v. United States, 4 Ct. Cl. 543, 547–48 (1868).

119. *See, e.g.*, *Pac. R.R.*, 120 U.S. at 234; *Nat'l Bd. of Young Men's Christian Ass'ns*, 396 F.3d at 472; *Perrin*, 4 Ct. Cl. at 547–48; *see also El-Shifa I*, 55 Fed. Cl. 751, 765 (2003).

120. *See supra* note 8 and accompanying text.

121. United States v. Russell, 80 U.S. (13 Wall.) 623, 628 (1871).

122. *See, e.g.*, *Perrin*, 4 Ct. Cl. at 547–48.

basis that the property was targeted or mislabeled as enemy property. Property taken or appropriated from friendly claimants may fall under the rubric of the military-necessity doctrine.[123] Hence, neither *El-Shifa* nor other cases under the enemy-property doctrine can be supported under military necessity on the basis that the property is enemy. The controlling factor is whether there is a military necessity that can be justified.

In conclusion, the enemy-property doctrine may borrow military-necessity principles to the extent that they do not exceed "the allowable limits of military discretion."[124] And this analysis must be conducted carefully. As former Chief Justice Rehnquist once stated, "[i]t is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power either dubious or nonexistent."[125]

IV. THE ALIEN-ENEMY DISABILITY RULE

Another doctrine limiting the right to receive just compensation for military takings is the alien-enemy disability rule. The Federal Circuit, in addition to borrowing military-necessity principles to create the enemy-property doctrine, also relied on the alien-enemy rule. This rule must be considered as a separate and distinct obstacle in a military takings claim.

Under the alien-enemy disability rule, destruction of property owned by alien enemies "engaged in the hostile service of a government at war with the United States" is not protected by the Takings Clause.[126] This is a conceded right.[127] As recognized by the Federal Circuit in *El-Shifa*, a contrary rule would require the government to provide compensation for the destruction of, for example, a vehicle used to engage the army in battle.[128] This struck the court as "absurd in the extreme."[129] The Court of Claims has also expressed similar sentiments: "[W]hen a man goes into a foreign country to reside, or when he acquires property there, or holds commercial intercourse with its inhabitants, he is bound to contemplate the possibility of a war between that country and his own, and must so conduct his affairs as always to be ready for the conse-

123. *See* Wiggins v. United States (The Wiggin's Case), 3 Ct. Cl. 412, 421–23 (1867).

124. Sterling v. Constantin, 287 U.S. 378, 401 (1932).

125. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224–25 (1998).

126. Johnson v. Eisentrager, 339 U.S. 763, 785 (1950).

127. Miller v. United States, 78 U.S. 268, 305 (1871); *see also Johnson*, 339 U.S. at 776 ("[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.").

128. *El-Shifa II*, 378 F.3d 1346, 1355–56 (Fed. Cir. 2004).

129. *Id.* at 1356.

quences."[130] The confiscation is not undertaken because of any criminal activity, but because of the relation of the property to the enemy.[131]

Proper application of the alien-enemy disability rule depends on the existence of an enemy target. Friendly individuals or their property do not excuse the government from liability under the "alien enemy" rule.[132] There are several approaches to defining alien enemies. Congress has defined them as "'natives, citizens, denizens, or subjects of [a] hostile nation or government' with which the United States is engaged in a 'declared war.'"[133] Another piece of legislation considered by courts is the Abandoned and Captured Property Act, which authorizes the capture of hostile property even though owned by private persons.[134]

Moreover, the U.S. Supreme Court has provided interpretations of the alien-enemy disability rule using principles of international law.[135] Courts have considered alien enemies to be enemies at war with the United States in a foreign jurisdiction[136] or within the United States.[137] For instance, in *Johnson v. Eisentrager*, the U.S. Supreme Court reviewed a case involving German nationals who were captured and confined overseas in a U.S. military court as enemy aliens.[138] In denying the enemy aliens a right to a writ of habeas corpus, Justice Jackson explained that if the Fifth Amendment provided enemy aliens with immunity from military trial, it would put people engaged in unlawful hostile action in a more protected position than our own soldiers.[139] The Court viewed the enemy alien's motives as a matter of allegiance:

> The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to

130. Green v. United States (Green's Case), 10 Ct. Cl. 466, 471 (1874).

131. *See* Juragua Iron Co. v. United States, 212 U.S. 297, 306 (1909).

132. Johnson v. Eisentrager, 339 U.S. 763, 769 (1950).

133. Nathaniel Segal, *After* El-Shifa*: The Extraterritorial Availability of the Takings Clause*, 13 CARDOZO J. INT'L & COMP. L. 293, 333 n.158 (2005) (quoting 50 U.S.C. § 21 (2002)).

134. Lamar v. Browne, 92 U.S. 187, 193 (1875).

135. *See* Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) ("The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional."); *see also Juragua Iron Co.*, 212 U.S. at 308–09 ("A person, though not a resident in a country, may be so associated with it through having or being a partner in a house of trade as to be affected by its enemy character, in respect at least, of the property which he possesses in the belligerent territory.") (quoting WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 500, 504, 533 (5th ed. 1904)).

136. *See, e.g.*, *Johnson*, 339 U.S. at 765–66, 785.

137. *See, e.g.*, Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931); Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953).

138. 339 U.S. at 765–66, 785.

139. *Id.* at 783, 785.

> disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.[140]

The *Johnson* Court also provided a concise definition of alien enemies: "In the primary meaning of the words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States."[141] Other definitions provided for an enemy include "one seeking to injure, overthrow, or confound an opponent"[142] or "[a] state with which another state is at war."[143] Furthermore, in war, everyone in enemy country is an enemy.[144]

And with regard to property, "[a]ll property within enemy territory is in law enemy property, just as all persons in the same territory are enemies."[145] Property can become "enemy property by virtue of its location in hostile territory."[146] Even someone who is neutral and "own[s] property within the enemy's lines, holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture."[147] Hence, cotton located in Confederate territory, but belonging to a British citizen, was found to be a legitimate subject of capture.[148] Moreover, the personal or commercial character of the owner is not determinative.[149] In *Thirty Hogsheads of Sugar v. Boyle*, for instance, Chief Justice Marshall considered a sugar plantation located in a Danish island seized by England in the War of 1812 as enemy property.[150] The sugar was captured as it was being transported by sea.[151] The owner of the property argued that the sugar was erroneously labeled enemy property because he had never incorporated himself with the interests of England; he was Danish by birth, and he did not voluntarily purchase a plantation in an enemy country.[152] In denying these claims and classifying the property as enemy, the Court noted that it was subject to capture because it derived from enemy soil.[153] As Chief Justice Marshall explained,

> [i]t is no extravagant perversion of principle, nor is it a violent

140. *Id.* at 772–73.
141. *Id.* at 769 n.2 (citation omitted).
142. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 412 (1984).
143. BLACK'S LAW DICTIONARY 569 (8th ed. 2004).
144. Lamar v. Browne, 92 U.S. 187, 194 (1875).
145. Young v. United States, 97 U.S. 39, 60 (1877).
146. *El Shifa I*, 55 Fed. Cl. 751, 767 (2003).
147. *Young*, 97 U.S. at 60.
148. *Id.* at 58.
149. *See* Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 197–98 (1815).
150. *Id.* at 195.
151. *Id.*
152. *Id.* at 197.
153. *Id.* at 199.

> offence to the course of human opinion to say that the proprietor, so far as respects his interests in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities.[154]

The character of the land can provide the status of enemy to nonresident aliens and citizens alike. As the U.S. Supreme Court has stated, "[f]or the purposes of capture, property found in enemy territory is enemy property, without regard to the *status* of the owner."[155] For example, property of a U.S. corporation doing business in Cuba was designated as enemy property.[156] Finally, property subject to confiscation for its enemy status is not limited only to tangible items. In *Green v. United States*, the Court of Claims upheld the confiscation of rents when, before the capture of the city by Union troops, a landlord of a building in Tennessee voluntarily entered and remained in Confederate territory.[157]

As the cases illustrate, the alien-enemy doctrine is widely recognized. However, the government cannot avoid the Takings Clause by using the military as a cover for activities that would otherwise be compensable if performed by one of its civilian agencies.[158] For instance, military aircraft overflights that do not result in the destruction or appropriation of enemy property may constitute valid takings claims.[159] The key ingredient of the doctrine is the existence of an alien enemy. In fact, this principle was reaffirmed in *Seery v. United States*.[160] In that case, the U.S. Army confiscated a naturalized citizen's house in Austria in 1945, along with his furniture, china, glassware, silver, rugs, paintings, and objects of art.[161] The army converted the house and used it as an officers' club for social and recreational purposes months after hostili-

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154. *Id.*

155. Lamar v. Browne, 92 U.S. 187, 194 (1877).

156. *See, e.g.*, *El-Shifa I*, 55 Fed. Cl. 751, 767 (2003) (citing Juragua Iron Co. v. United States, 42 Ct. Cl. 99, 111–12 (1907)).

157. Green v. United States (Green's Case), 10 Ct. Cl. 466, 474 (1874). The court justified the confiscation noting that

> in law he cannot be clothed with this twofold character; he cannot be regarded as a loyal citizen of the United States and as a public enemy. The criminal portion of his case we put entirely out of view, and regard him simply in his self-assumed character of a public enemy. The facts upon which his case must now be adjudged are strictly these: that he was domiciled within the insurrectionary district when the war began and that he voluntarily entered and remained within the enemy's lines until it ended.

Id. at 472.

158. *El-Shifa II*, 378 F.3d at 1356 (citing Argent v. United States, 124 F.3d 1277, 1281–85 (Fed. Cir. 1997)).

159. *Id.*

160. 127 F. Supp. 601, 605–06 (Ct. Cl. 1955).

161. *Id.* at 602–03.

ties in the area had ended.[162] The government claimed that, according to international law, property located in Austria at that time was enemy property.[163] In awarding just compensation, the Court of Claims disagreed with the government and found that the property was not in enemy territory.[164] The German Armed Forces had surrendered some months before, and there were no enemy activities in Austria.[165] Moreover, several sources found to be controlling, including a Department of State bulletin, a presidential address, and other declarations, named Austria as a "liberated area."[166] The fact that allied forces maintained occupation in Austria to prevent possible pro-Nazi uprisings was immaterial to an enemy designation.[167]

The Federal Circuit in *El Shifa II* reaffirmed the trial court's finding that the alien-enemy disability rule contributed to the enemy-property doctrine because President Clinton targeted El-Shifa as an enemy military facility.[168] However, the enemy-property doctrine's use of alien-enemy principles presupposes the existence of an enemy target. As *Seery* demonstrates, the controlling factor in determining whether a Takings Clause reaches military conduct is whether there was destruction or appropriation of property falling within the definition of "enemy."[169] This depends in part on circumstances such as whether the taking occurred during wartime, the character of the military activity, and the U.S. foreign policy with respect to the country in question.[170] As the Federal Circuit recognized, "[m]ilitary conduct that does not touch on the destruction or appropriation of enemy property can sometimes give rise to a valid takings claim."[171] In *El-Shifa*, the Federal Circuit declined to decide whether the designation of the facility as enemy property was erroneous. Instead, the court found that the issue concerned a nonjusticiable political question.[172] Nevertheless, the court's opinion does suggest that in applying alien-enemy principles to the enemy-property doctrine, future litigants should exercise caution in limiting the doctrine to cases where the target may satisfy the criteria for an "enemy" designation.

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162. *Id.*
163. *Id.* at 606.
164. *Id.* at 605.
165. *Id.* at 606.
166. *Id.* at 604–05 (citations omitted).
167. *Id.* at 606.
168. 378 F.3d 1346, 1350 (Fed. Cir. 2004).
169. 127 F. Supp. at 605–06.
170. *See id.*
171. *El-Shifa II*, 378 F.3d at 1356 (citing Argent v. United States, 124 F.3d 1277, 1281–85 (Fed. Cir. 1997)).
172. *Id.* at 1365.

V. APPLICATION OF TAKINGS JURISPRUDENCE ABROAD

An evaluation of takings jurisprudence in the context of nonresident aliens and foreign property is necessary to better understand the enemy-property doctrine. The U.S. Supreme Court in *Reid v. Covert* adopted the current view that constitutional protections apply to U.S. citizens in foreign jurisdictions.[173] In addition, an alien can bring a just compensation claim if the taking occurs within the United States.[174] Nevertheless, the Fifth Amendment's application to alien property located outside the United States is unclear. Because the Takings Clause does not provide otherwise and because it can be enforced without inconvenience or practical difficulty, some courts have reasoned that it should apply to foreign-owned, foreign-located property.[175] Precedent, however, shows that this rule is not clearly established.[176]

Beginning with *Johnson v. Eisentrager*, a pre-*Reid* decision, the U.S. Supreme Court indicated that alien enemies may not bring a civil action in the United States.[177] In 1953 the Court of Claims held in *Turney v. United States* that the U.S. Army's seizure of a Fillipino corporation's radar equipment constituted a taking for which the United States owed just compensation.[178] In rejecting the government's argument that the Fifth Amendment did not apply in foreign countries, the court recognized that there was no decision directly on point.[179]

In the 1990 case of *United States v. Verdugo-Urquidez*, the U.S. Supreme Court rejected a claim that the Fourth Amendment applied to a warrantless search of a Mexican citizen's home in Mexico.[180] The plaintiff in that case relied in part on settled precedent indicating that the right to just compensation for property taken by the United States was available to nonresident aliens.[181] Nevertheless, the Court stated that

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173. 354 U.S. 1, 8–9 (1957) ("This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.") (citations omitted).

174. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931).

175. *See, e.g.*, Seery v. United States, 127 F. Supp. 601, 605–06 (Ct. Cl. 1955) (rejecting argument that just compensation claims should be dismissed because private property at issue was located in Austria); Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953) (noting that a just compensation claim can apply to property located abroad).

176. *See, e.g.*, *El-Shifa II*, 378 F.3d at 1351–52; *Turney*, 115 F. Supp. at 463–64.

177. 339 U.S. 763, 776 (1950).

178. 115 F. Supp. at 463–64.

179. *Id.* at 464.

180. 494 U.S. 259, 274–75 (1990).

181. *Id.* at 271.

previous cases established "only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country. Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not."[182]

According to the Federal Circuit's recent pronouncement in *El-Shifa II*, *Verdugo-Urquidez* and *Turney* conflict.[183] Indeed, as the Federal Circuit suggests, the U.S. Supreme Court's reading in *Verdugo-Urquidez* purportedly overrules *Turney*, suggesting that stronger voluntary connections to the United States are necessary before a claimant can invoke constitutional protections.[184] The Federal Circuit, however, declined the invitation to overrule *Turney*.[185] Furthermore, the Court refused to clarify this area of the law when it denied certiorari to hear El-Shifa's appeal.[186] As a result, the requirements for the extraterritorial applicability of the Fifth Amendment to the enemy-property doctrine remain unclear.

VI. COMMENT: WHAT IS THE ENEMY-PROPERTY DOCTRINE?

The Federal Circuit's opinion in *El-Shifa II* initiated a novel inquiry into the meaning of the enemy-property doctrine. Although the Federal Circuit did not precisely define the scope of the enemy-property doctrine, it is clear that the doctrine was not created using a blank canvas. The *El-Shifa II* court borrowed principles derived from at least two long-standing takings doctrines to create this new doctrine. However, as this note illustrates, both of these borrowed doctrines—the military-necessity doctrine and the alien-enemy disability rule—present separate and distinct obstacles for litigants seeking compensation in a military-takings action.

Military necessity "separates losses that are necessary incidents of the ravages and burdens of war from those situations where the Government is obliged to pay compensation to the owner of private property that is taken for public use."[187] Military necessity does not excuse governmental liability on the basis that the property is enemy. Rather, there must be an exigency supporting the military action.[188] The key factor

182. *Id.* (citations omitted).

183. *El-Shifa II*, 378 F.3d 1346, 1352 (Fed. Cir. 2004).

184. *Id.*

185. *Id.* (citing George E. Warren Corp. v. United States, 341 F.3d 1348, 1351 (Fed. Cir. 2003)).

186. *See* El-Shifa Pharm. Indus. Co. v. United States, 545 U.S. 1139 (2005).

187. Nat'l Bd. of the Young Men's Christian Ass'ns v. United States, 396 F.2d 467, 471 (Ct. Cl. 1968).

188. United States v. Russell, 80 U.S. (13 Wall.) 623, 628 (1871).

under any military-necessity claim is the existence of a necessary destruction or appropriation.[189] On the other hand, as the Federal Circuit recognized, "the United States does not have to answer under the Takings Clause for the destruction of enemy property or, . . . 'enemy war-making instrumentalities.'"[190] The latter exception provides the basis for the alien-enemy destruction rule.[191] Under this principle, the Fifth Amendment is not suspended in cases where friendly property is destroyed.[192]

The Federal Circuit's use of the military-necessity and alien-enemy doctrines to approach the situation presented by *El-Shifa* is not unexpected. The *El-Shifa* case deals with the destruction by the military of asserted enemy property to protect the nation because the President determined this operation was necessary to secure national self-defense.[193] The government may avoid liability under the military-necessity doctrine or by virtue of the President's designation of El-Shifa as an enemy military facility.[194]

Indeed, *El-Shifa* is not the first case that involves a double whammy. In *Juragua Iron Co. v. United States*, a U.S. corporation doing business in Cuba, an enemy territory during the Spanish-American War, could not obtain just compensation when all "places of occupation or habitation which might contain [yellow] fever germs" were ordered destroyed.[195] Because the destruction was deemed necessary to preserve the health of U.S. troops engaged in operations in Cuba, the Court invoked the military-necessity doctrine.[196] In addition, the Court deemed the corporation's property as enemy property because it was domiciled in Cuba, the enemy's country.[197]

> A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile

189. *See, e.g.*, United States v. Caltex (Phil.), Inc., 344 U.S. 149, 155 (1952) (finding destruction of facilities storing oil a necessary deprivation of a "potential weapon of great significance to the invader"); Juragua Iron Co. v. United States, 212 U.S. 297, 301, 305–06 (1909) (noting that the destruction of property was necessary to preserve the health of the troops and prevent the spread of disease among them); *see also supra* notes 62–112 and accompanying text.

190. *El-Shifa II*, 378 F.3d 1346, 1355 (Fed. Cir. 2004).

191. *See id.*

192. Seery v. United States, 127 F. Supp. 601, 605–06 (Ct. Cl. 1955).

193. 378 F.3d at 1349.

194. *See id.* at 1363–64.

195. 212 U.S. 297, 301, 308 (1909).

196. *Id.* at 301.

197. *Id.* at 305–06.

nation.[198]

The difference between *El-Shifa* and *Juragua* concerns the Federal Circuit's decision to consider *El Shifa* under a new doctrine. This is problematic because military necessity and the alien-enemy rule are two narrow and distinct principles. Neither the military-necessity doctrine nor the alien-enemy rule can be combined to support a categorical exception in a case like *El-Shifa*. To avoid liability under the Fifth Amendment, the government must satisfy the elements of either the military-necessity or the alien-enemy rule, or both. If *El-Shifa* does not involve a necessity justifying the destruction, the enemy-property doctrine cannot bar a takings claim unless the property destroyed was that of an enemy. Hence, the enemy-property doctrine is an illogical extension of military-conduct exceptions to takings jurisprudence to the extent it blurs the narrow parameters of the military-necessity doctrine or the alien-enemy rule. Furthermore, as demonstrated by the cases discussing the applicability of the Fifth Amendment to individuals like Mr. Idris, a nonresident alien whose property was destroyed abroad, it is unsettled whether strong voluntary connections, as required by *Verdugo-Urquidez*, are a prerequisite to a successful takings claim.[199] This aspect of the enemy-property doctrine was undecided by the Federal Circuit and remains unsettled.[200]

A fair definition of the enemy-property doctrine is broad, serving as an umbrella for narrower situations where the United States does not have to answer under the Takings Clause. Nevertheless, future applications of the enemy-property doctrine should require a fair examination of both the military-necessity doctrine and the alien-enemy disability rule. The threshold requirements created by cases examining military-necessity and alien-enemy principles should be considered distinct limitations to colorable takings claims. In conclusion, the notion that takings claims for military destructions or appropriations will be more successful as a result of the birth of the enemy-property doctrine should be rejected.

198. *Id.* at 308 (quoting WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 340, 342 (43d ed., Lee & Shepard 1871)).

199. *See supra* notes 173–80 and accompanying text.

200. *El-Shifa II*, 378 F.3d 1346, 1352 (Fed. Cir. 2004).